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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 473

HARRY K. AHOYIAN *et al.*,
APPELLANTS,

v.

MASSACHUSETTS TURNPIKE AUTHORITY *et al.*,
APPELLEES.

JURISDICTIONAL STATEMENT

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Blanchard Printing Company, Boston, Mass. — Law Printers

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JURISDICTIONAL STATEMENT

(A)

On June 4, 1962, a three-judge court of the District of Massachusetts, by unanimous action, delivered the "Opinion of the Court" on the question of dismissing an action brought to declare unconstitutional both a statute of Massachusetts and the exercise of authority under that statute.

A copy of this Opinion is appended in Appendix "A".

(B)

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. s.1253 and s.2101(b). The appeal is from a final decision of a three-judge court dismissing a complaint upon motions to dismiss specifying that the com-

plaint failed to state a cause of action upon which relief can be granted.

(i) This action was instituted under 28 U.S.C. s.1331(a) and s.1343(3) in the form of a class suit brought under Rule 23(a)(1) and (3) of the Federal Rules of Civil Procedure, seeking declarations both that a statute of Massachusetts and that the exercise of authority under that statute was unconstitutional, pursuant to 28 U.S.C. s. 2201 and s. 2202, and seeking preliminary and permanent injunctions restraining the enforcement, operation, or execution of said state statute and restraining the action of any officer of such state in the enforcement or execution of such statute upon the ground of unconstitutionality. A three-judge court was convened for the purpose of hearing and determining this action pursuant to the provisions of 28 U.S.C. s. 2281 and s. 2284.

The complaint (Tr., pp. 1-39, pp. 40-50) alleges that the statute in question, permitting the construction of an express toll highway, and the actual and proposed exercise of authority by state officers under that statute in connection with such construction each constituted a deprivation of the constitutional rights of the plaintiffs.

(ii) On June 4, 1962 the defendants' motions to dismiss (Tr., pp. 51-58) were allowed, and a final judgment was entered in the United States District Court for the District of Massachusetts that the complaint be dismissed. It is this judgment, appended in Appendix "C", which is here sought to be reviewed.

Motions for rehearing, to alter or amend judgment, and to vacate judgment were filed on June 14, 1962. These three motions were denied on June 21, 1962. (Tr., pp. 81-84)

On August 3, 1962 the plaintiffs caused to be entered in the United States District Court for the District of Massachusetts their Notice of Appeal to the Supreme Court of the United States. (Tr., pp. 95-97)

(iii) Jurisdiction of this appeal is conferred on the Supreme Court of the United States by 28 U.S.C. s. 1253 and s.2101(b).

(iv) The jurisdiction of the Court is believed sustained in *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691; *Martin* v. *Creasy*, 360 U.S. 219, 3 L.Ed.2d 1186, 79 S.Ct. 1034; and *Berman* v. *Parker*, 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98.

(v) The state statute in question, herein referred to as the Turnpike Act, is Chapter 354 of the Acts and Resolves of 1952, as amended by Chapter 47 of the Acts and Resolves of 1955, and by Chapter 290 and Chapter 384, ss. 1,2,3, and 4 of the Acts and Resolves of 1958 of the Commonwealth of Massachusetts. It was not enacted as a part of the General Laws of said Commonwealth. It is set out in Massachusetts General Laws Annotated as Appendix to Chapter 81. The said statute, as amended, is set forth in full in Appendix "B" appended.

Also in question is Massachusetts General Laws (Ter. Ed.), c. 79, s. 40, which is incorporated by reference into the Turnpike Act by s.1-5(k) thereof. Said s.40 of Chapter 79 reads as follows:

"Before a taking is made or injury inflicted by a private corporation for which damages may be recovered under this chapter, such corporation shall give to the board of officers by whom such damages are to be awarded security to their satisfaction for the payment of all damages and costs which may be awarded by them or by the court for the land or other property taken or injured; and if, upon petition of the owner and notice to the adverse party, any security taken appears to them to have become insufficient, they shall require the corporation to give further security to their satisfaction. If the corporation fails to comply with this section any person entitled to such damages may treat the taking of his property or the proceedings by which

the right to inflict injury thereon was acquired and any interference by such corporation with the use and enjoyment of his property as unlawful."

(C)

The following questions are presented by this appeal:

1. Whether the district court erred in dismissing the complaint without giving the notice to all members of the class as required by Rule 23(c) of the Federal Rules of Civil Procedure.

2. Whether the district court erred in dismissing the complaint as prematurely brought.

3. Whether the district court erred in dismissing the complaint for lack of jurisdiction.

4. Whether the district court erred in dismissing the complaint for failure of plaintiffs to exhaust an administrative remedy.

5. Whether the district court erred in holding that *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 required dismissal of the complaint.

6. Whether the district court erred in dismissing the complaint upon motions to dismiss specifying that the complaint failed to state a cause of action upon which relief can be granted.

7. Whether the district court erred in determining or failing to determine that the complaint failed to state a cause of action upon which relief can be granted.

8. Whether the district court erred in appraising or in failing to appraise the sufficiency of the complaint to raise doubts of the unconstitutionality of both the state Act and the exercise of authority by the defendants under said Act, both complained of in the complaint.

9. Whether the district court erred in its appraisal of *Opinion of the Justices*, 330 Mass. 713, 113 N.E. 2d 452.

10. Whether the district court erred in failing to deny the

defendants' motions to dismiss and proceeding to a hearing on the merits.

11. Whether the district court erred in dismissing the complaint without leave to amend.

12. Whether the district court erred in dismissing the complaint without specifying the effect of its dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

(D)

A concise statement of the case containing the facts material to the consideration of the questions presented is as follows:

The plaintiffs in this action constitute a class of landowners similarly affected by eminent domain land takings made and proposed to be made by a board of public officers known as the Massachusetts Turnpike Authority, one of the defendants. Section 1-3 of the statute (Appendix "B") creating this board describes it as a "body politic and corporate, constitutes it a "public instrumentality", and terms its exercise of power conferred by the statute "the performance of an essential governmental function."

The Supreme Judicial Court of Massachusetts has twice said that the Massachusetts Turnpike Authority is a "public corporation".

The eminent domain taking and the complaint concern the proposed construction under the statute of a limited access toll road approximately ten miles in length and eight lanes wide, connecting the Weston terminus of the presently existing Massachusetts Turnpike, via the City of Newton, with a point within the City of Boston, said toll road being known as the "Boston Extension".

The complaint alleges that the Turnpike Act deprives the plaintiffs of the following federal constitutional rights: (1) the equal protection of the laws guaranteed by the Fourteenth Amendment; (2) the due process guaranteed

by the Fifth Amendment and made applicable to the states through the Fourteenth Amendment; and (3) prohibition of laws impairing contracts provided for by Article 1, Section 10.

The complaint further alleges that the proposed construction of the Boston Extension is an exercise of statutory authority which deprives the plaintiffs of the federal constitutional rights set forth under (2) and (3) of the preceding paragraph.

The complaint also alleges that the proposed construction deprives the plaintiffs of state constitutional guarantees, namely, Part 1, Article 10 and Part 1, Article 11 of the Declaration of Rights and Article LXII, Section 1 of the Articles of Amendment of the Massachusetts Constitution.

The complaint and the amendments to the complaint set out the facts with great particularity. (Tr. pp. 1-50)

The most important facts material to the consideration of the questions presented are summarized as follows:

(1) Massachusetts has two statutes authorizing eminent domain land takings for the purpose of laying out and constructing limited access highways, one the State Highways Act, G.L. (Ter. Ed.), c. 81, s. 5, the other the statute in question, the Turnpike Act, set forth in Appendix "B". These statutes are unequal. The State Highways Act requires the Department of Public Works to hold a hearing, with notice, on the necessity for the taking, to file a highway plan, and involves the Department in "adjudicatory proceedings" under the State Administrative Procedure Act, G.L. (Ter. Ed.), c. 30A, added by St. 1954, s. 681, s.1, which provides well defined rights of judicial review under Section 14 thereof. The Turnpike Act, on the other hand, requires no hearings or any adjudicatory proceedings, does not require the filing of a highway plan, and makes no provision for any judicial review of errors of law, constitu-

tional transgressions, or capricious action; although Section 1-17 of the Turnpike Act provides that the Massachusetts Turnpike "shall become part of the state highway system and shall . . . be . . . operated . . . free of tolls . . ." The only right of the landowner whose land has been taken by eminent domain under the Turnpike Act is to petition for an assessment of damages in the Superior Court. The inequality of the two statutes is complained of as denying the equal protection of the laws and as offensive to principles of due process.

(2) The provisions of the Turnpike Act for adequate compensation for the eminent domain takings are insufficient, in that they do not guard against either substantial risk to the landowner of fair compensation or unreasonable delay in obtaining it.

(3) The Turnpike Act permits arbitrary, unreasonable action on the part of the board of public officers exercising the statutory authority, without adequate standards or adequate procedures for judicial review, and hence is offensive to principles of due process.

(4) The takings for the proposed construction will involve land valued in excess of $43,000,000, and will cause other damage in excess of $50,000,000; whereas the Turnpike Authority has only approximately $25,000,000[1] available for the satisfaction of these liabilities. The Turnpike Act provides for no "earmarking" of funds for damages as to particular landowners, so that all recipients of damages for the takings share in a common fund, either pro-rata or on a first-come-first-paid basis. The provision in the Turnpike Act for the issuance of additional bonds is

[1] An affidavit, not part of the Record in this case, later examined, discloses that a Right of Way Account of $22,750,000 was established for the takings. Upon certification, however, by the Turnpike Authority to the First Nat'l Bank of Boston that this amount is more than sufficient, said bank may transfer excess to the Highway Account for construction costs.

not predicated upon any obligation on anyone's part to purchase them. Hence, both federal and state principles of reasonable compensation in a constitutional sense are violated.

(5) The security for the payment of damages required by Section 1-5(k) of the Turnpike Act itself was not furnished.[1]

(6) The provisions of G.L. (Ter. Ed.), c. 79, s. 40 are not available to the plaintiffs for obtaining security or further security for their damages.

(7) The Turnpike Act permits, and the Turnpike Authority proposes, the use of revenues from the presently existing Massachusetts Turnpike (land already acquired for the Commonwealth) to make payments on bonds issued for the construction of the Boston Extension (land to be acquired for the Commonwealth), in impairment of the Turnpike Authority's prior contracts and unlawfully involving the credit of the Commonwealth for the benefit of private persons.

(8) In addition to making "paper awards" of One Dollar in the case of each taking, offering some owners as little as twenty-five percent of the fair value of their property, failing to inform affected property owners of their full rights under the law, and failing to comply with G.L. (Ter. Ed.), c. 79, s. 8 in the matter of notice, the defendant Turnpike Authority is engaged in an arbitrary, wantonly injurious, capricious, and unreasonable action, affecting adversely the highly urbanized areas of Newton and Boston, in contravention of due process. It is making its takings in a series of progressive, fractionated transactions, with-

[1] An affidavit, not part of the Record in this case, later examined, discloses that a Right of Way Account of $22,750,000 was established for the takings. Upon certification, however, by the Turnpike Authority to the First Nat'l Bank of Boston that this amount is more than sufficient, said bank may transfer excess to the Highway Account for construction costs.

out disclosing any over-all highway plan, which was not even complete at the time of the first Boston Extension takings, so that the full extent of its action will not be known, and the questions of the propriety and constitutionality of its action will not be obvious, until after the matter has been rendered academic or moot in the very building of the toll road extension.

(9) *Opinion of the Justices*, 330 Mass. 713, 113 N.E.2d 452 did not raise or decide, nor did any later Supreme Judicial Court of Massachusetts opinion or decision deal with, any of the federal constitutional questions raised by the present complaint.

(10) There is no state court decision interpreting the applicability, if any, of G.L. (Ter. Ed.), c. 79, s. 40 to the Turnpike Act.

(11) *Opinion of the Justices*, 341 Mass. 738, 167 N.E.2d 745, contains the following language: "Nothing is said as to the applicability of the state administrative procedure act, G.L., c. 30A, or other review of the acts of the authority in applying clearly defined standards."

The three-judge court deferred the issuance of orders to the defendants to show cause why temporary injunctions should not be issued against them, until motions to dismiss by the defendants could be filed and heard.

The motions to dismiss assigned the single ground that the complaint failed to state a cause of action upon which relief could be granted.

The case came on to be heard on said motions and, after consideration, the three-judge court ordered the complaint dismissed. Judgment was entered on June 4, 1962. The order of dismissal was made without reference to Rule 23(c) and without specifying the effect of the dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

As one consequence, in a state suit subsequently brought on behalf of Hyman Radler, one of the plaintiffs in this

action, against the same defendants, the defendants' plea in bar that the federal district court's judgment of June 4, 1962 was an adjudication on the merits and was *res judicata*, was allowed.

The stated basis of the three-judge court's dismissal of the complaint was that an administrative remedy (Chapter 79, Section 40, *supra*) was available and had to be exhausted, and that the action was, therefore, prematurely brought. Whether the dismissal was also upon grounds of lack of jurisdiction, or exhaustion of state judicial remedy, or abstention is not clear. Statements in the Opinion from which such grounds may be inferred are somewhat elliptical.

If, however, the three-judge court erred in misconceiving the administrative remedy referred to—or in avoiding an appraisal of it in the absence of any state law on the point—as either available, or adequate, or required, to be exhausted in the circumstances of a statute claimed to be unconstitutional, or whether it could be competently or feasibly employed by the plaintiffs for any purpose; then an appraisal of the sufficiency of the complaint was before it in the light of *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579, 24 S.Ct. 553, 48 L.Ed. 795, 801; *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939, 943; *Gibbs* v. *Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111; *Hart v. B.F. Keith Vaudeville Exch.* 262 U.S. 271, 274, 43 S.Ct. 540, 67 L.Ed. 977, 979; *Conley* v. *Gibson*, 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80; among others.

The judgment of dismissal in the posture of this case is the equivalent of a final order denying, after notice and hearing, a permanent injunction in a civil action required by an Act of Congress (U.S.C. s.2281 and s.2284) to be heard and determined by a district court of three judges, and is appealed from under U.S.C. s. 1253 and s. 2101(b).

(E)

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, for the following reasons:

The case presents substantial allegations of unconstitutionality concerning a state authorized project of great magnitude, which will affect directly thousands of property owners and countless others, such as tenants and business lessees. Time is of the very essence in obtaining a judicial review of these questions, for continued construction of the project, if unlawful, will result in irreparable harm to all parties on both sides of the controversy.

The case also presents an important question of the justiciability of controversies in the federal district courts arising under the Constitution of the United States in matters exceeding the value of $10,000 in the judicial enforcement of the eminent domain power of a state or a political subdivision thereof.

Included among the several questions of federal unconstitutionality is that of taking property without reasonable or just compensation. In the present posture of the case, the plaintiffs are permanently deprived of the right to have these questions resolved by a court of competent jurisdiction property invoked, the determination of which questions necessarily involves the discovery of facts peculiarly within the knowledge of the defendants and a trial at which testimony can be adduced.

Underlying this is a basic question of major importance in all similar legislation on the subject. Did the Massachusetts legislature, merely by reciting what purports on its face to be an administrative remedy, whether of a full or limited nature, ambiguous as to its applicability and with a reservation of applicability specifically written in, without any procedural standards for its use if applicable, and where there has been no judicial decision in any court ap-

praising it availability, scope, or efficacy, by this simple expedient bind the three-judge court in Massachusetts and forestall its inquiry into federal constitutional questions? If the answer to this question is in the affirmative, how easily then has the purpose of Congress that state power not be used as an instrument to circumvent federally protected rights been thwarted.

The question, it is submitted, is whether the three-judge court did not have the plain duty to go behind the legislative recitation purportedly creating an administrative remedy (particularly here, where no state court decision was available on the point, and where the three-judge court itself was troubled by the meaning of the remedy as legislated) to appraise the remedy for itself, before applying a doctrine, the many exceptions to which depended upon just such an appraisal. (See Davis, Administrative Law Treatise, 1958, s. 20.04)

Stated in another way, the question is whether the three-judge court was correct in remitting the plaintiffs to the labyrinth and delay of an unexplored administrative remedy, there to demonstrate the very constitutional infirmities which would induce that court to act.

(F)

The judgment appealed from is set forth in full in Appendix "C" appended.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE COURT

June 4, 1962

ALDRICH, *Circuit Judge*. This motion to dismiss an action brought to declare Chapter 354 of Massachusetts Acts of 1952, as amended, hereinafter the Act, to be in violation of the Fifth and Fourteenth Amendments of the United States Constitution does not require extensive discussion. Plaintiffs do not favor us with a reference to the particular statute under which they assert our jurisdiction. All parties, with the exception of a corporation having its principal place of business there, are citizens of Massachusetts. There are 18 named plaintiffs, but the complaint is framed in the nature of a class suit for these plaintiffs and others similarly situated who counsel said in oral argument "are with us in spirit." Defendants claim that 28 U.S.C.A. (1343(3) which, unlike section 1331(a), requires no jurisdictional amount, is inapposite; that this is not an appropriate class action,[1] and that alleging the jurisdictional amount in the plaintiffs as a whole, as it is presently laid, is insufficient. Counsel stated in argument, however, that a number of plaintiffs, if permitted to amend, could each assert this amount. In view of our disposition herein we need not further pursue this matter.

The named plaintiffs are residents of Boston whose land and buildings either have been, or allegedly are about to be, taken by eminent domain as part of the right of way for the Massachusetts Turnpike Boston Extension to be constructed by the Massachusetts Turnpike Authority. The defendants are the Authority, a body corporate created by the Act, Perini Corporation, a general contractor, and the

[1] Defendants' case of *Coffman* v. *City of Wichita*, D.C.D.Kan., 1958, 165 F.Supp. 765, *aff'd* 261 F.2d 112, however, seems readily distinguishable.

First National Bank of Boston, trustee for bondholders who have already loaned the Authority $180,000,000. Many of the provisions of the Act are set forth and fully considered in the light of Article 10 of the Massachusetts Declaration of Rights, as amended, by the Massachusetts court in Opinion of the Justices, 1953, 330 Mass. 713. We are directed to no pertinent differences between the two constitutions.[2]

Plaintiffs contend that the provisions of the Act are a "denial of due process, not taken individually, but taken collectively." We have viewed all matters embraced in this rather unusual position, but will refer only to two. Plaintiffs point to the fact that the Massachusetts State Highways Act, Mass. G.L. c. 81, permits public hearings on the laying out of ordinary highways, whereas the present Act provides none. Apart from equal protection, viz, that this is an unlawful discrimination, plaintiffs do not claim a constitutional right to a public hearing. We see adequate distinguishing circumstances. The general statute, which grants the commission authority to lay out highways, gives no directions of any kind as to any particular one, whereas the present Act, of course, does. There is a difference between a road to be determined by a commission and one designated by the legislature. We do not see any unlawful delegation in permitting the Authority to make the final ministerial selection of the exact path. *Cf. Dreyer* v. *Illinois*, 1902, 187 U.S. 71; *Opinion of the Justices, supra.* Nor

[2] Plaintiffs do say that the Massachusetts case is not authoritative here because the court was passing only upon procedures for taking land in "Westborough, Stockbridge, Northborough, etc." and not in the "highly urbanized areas of Newton and Boston." We are somewhat surprised by this argument, particularly in view of plaintiffs' insistence elsewhere, in discussing equal protection, that no ground exists to distinguish procedures for ordinary highway takings and those for a "full-blown . . . turnpike" (which they gratuitously add will have "an obstructed view of the Prudential Tower."). We think plaintiffs' argument is fallacious.

are plaintiffs without certain rights of review. *Luke* v. *Massachusetts Turnpike Authority*, 1958, 337 Mass. 304.

The only question of possible importance relates to procedures for payment. The Act expressly provides that there shall be no liability in the Commonwealth, but only in the Authority. Section 5(k) of the Act empowers the Authority to acquire land "by the exercise of the power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws provided, further, that the Authority shall give security to the state treasurer, in such amount and in such form as may be determined by the state department of public works, for the payment of such damages as may be awarded in accordance with law for such taking, and that the provisions of section forty of said chapter seventy-nine, in so far as applicable, shall govern the rights of the Authority and of any person whose property shall be so taken;"

Chapter 79, §40, provides as follows:

"*Taking by private corporations; security for damages.* Before a taking is made or injury inflicted by a private corporation for which damages may be recovered under this chapter, such corporation shall give to the board of officers by whom such damages are to be awarded security to their satisfaction for the payment of all damages and costs which may be awarded by them or by the court for the land or other property taken or injured; and if, upon petition of the owner and notice to the adverse party, any security taken appears to them to have become insufficient, they shall require the corporation to give further security to their satisfaction. If the corporation fails to comply with this section any person entitled to such damages may treat the taking of his property or the proceedings by which the right to inflict injury thereon was acquired as void

and any interference by such corporation with the use and enjoyment of his property as unlawful."

There is nothing in plaintiffs' argument that since the Authority is a public rather than a private corporation section 40 is not applicable to it. This would mean that the entire reference to that section in the Act is meaningless, a position impossible to take seriously. A more difficult question concerns the meaning of this section. Does the phrase "petition [to] require the corporation to give further security" mean security sufficient for plaintiffs' personal payments, security sufficient for the "class" of plaintiffs represented in this action, whoever they may be, or security sufficient for all takings made and to be made under the Act? Obviously it would do the plaintiffs no good to have security sufficient simply for their own personal purpose unless it were earmarked, for which we find no provision in the statute. On the other hand, on the allegations of the complaint we foresee difficulty in making any reasonable determination of what would be sufficient security for any larger group, limited or unlimited. We asked defendants' counsel during argument for an interpretation of section 40 in this respect, but he did not adequately answer. Instead, defendants point to the fact that $180,000,000 is in the hands of the Authority available to pay condemnation claims and the fact that plaintiffs allege no such total requirement under any circumstances for condemnation payments. The difficulty with this argument is that the Act authorizes the expenditure of this money for any and all costs of construction, and there is no guarantee that, absent a sufficient security deposit, it might not be wholly consumed before payments to plaintiffs were finally made.[3] Defendants' case of *Cherokee Nation* v. *Southern*

[3] Defendants point to the power of the Authority to issue additional bonds. It may be questionable how much weight we can attach to this since there is no obligation upon anyone to purchase them.

Kansas Ry. Co., 1890, 135 U.S. 641, involved an adequate deposit. *Cf. Connecticut River R.R.* v. *County Commissioners*, 1879, 127 Mass. 50.

This question, however, is premature. Before plaintiffs can raise any constitutional issues it is axiomatic that they must exhaust their administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 1938, 303 U.S. 41. Plaintiff's first move should have been to seek the relief offered by section 40 itself. *McCarthy* v. *Woburn Housing Authority*, 1960, 341 Mass. 539. If thereafter constitutional infirmities appear in this regard—whether "thereafter" includes seeking relief in the state courts we do not intimate—it will be time enough to consider them.

The complaint is dismissed.

United States Circuit Judge

APPENDIX "B"

Massachusetts Turnpike

St. 1952, c. 354, as amended was not enacted as a part of the General Laws, but is set out herein for convenient reference.

§ 1-1. Turnpike Authority empowered to construct, maintain and repair. The Massachusetts Turnpike Authority (hereinafter created) is hereby authorized and empowered, subject to the provisions of this act, to construct, maintain, repair and operate at such location as may be approved by the state department of public works a toll express highway, to be known as the "Massachusetts Turnpike", from a point in the vicinity of the city of Boston or from a point or points within said city to a point at or near the boundary line between the Commonwealth and the State of New York or such part or parts thereof as it may determine, and to issue turnpike revenue bonds of the Authority, payable solely from revenues, to finance such turnpike. St. 1952, c. 354, § 1, as amended St. 1955, c. 47.

§ 1-2. Credit of Commonwealth Not Pledged. Turnpike revenue bonds issued under the provisions of this act shall not constitute a debt of the commonwealth or of any political subdivision thereof or a pledge of the faith and credit of the commonwealth or of any such political subdivision, but such bonds shall be payable solely from the funds herein provided therefor from revenues. All such turnpike revenue bonds shall contain on the face thereof a statement to the effect that neither the commonwealth nor the Authority shall pay the same or the interest thereon except from revenues of the turnpike and that neither the faith and credit nor the taxing power of the commonwealth or of any

political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds.

All expenses incurred in carrying out the provisions of this act shall be payable solely from funds provided under the authority of this act and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under the provisions of this act. St. 1952, c. 354, § 2.

§ 1-3. Massachusetts Turnpike Authority. There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Turnpike Authority", which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, bureau or agency of the commonwealth, except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality, and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be the performance of an essential governmental function.

The Massachusetts Turnpike Authority shall consist of three members, to be appointed by the governor, by and with the advice and consent of the council, who shall be residents of the commonwealth, not more than two of whom shall be of the same political party. The members of the Authority first appointed shall continue in office for terms expiring on July first, nineteen hundred and fifty-eight, July first, nineteen hundred and fifty-nine and July first, nineteen hundred and sixty, respectively, the term of each such member to be designated by the governor, and until their respective successors shall be duly appointed and qualified. The governor shall designate one of the members as chairman who shall serve as such during his term

of office. Upon the expiration of the term of office of such chairman, the governor shall appoint one of the members as his successor as chairman. The successor of each member shall be appointed for a term of eight years, except that any person appointed to fill a vacancy shall serve only for the unexpired term. Any member of the Authority shall be eligible for reappointment. Each member of the Authority before entering upon his duties shall take an oath before the governor to administer the duties of his office faithfully and impartially, and a record of such oaths shall be filed in the office of the secretary of the commonwealth.

The Authority shall elect one of the members as vice chairman thereof and shall also elect a secretary-treasurer who need not be a member of the Authority. Two members of the Authority shall constitute a quorum and the affirmative vote of two members shall be necessary for any action taken by the Authority. No vacancy in the membership of the Authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the Authority.

Before the issuance of any turnpike revenue bonds under the provisions of this act, each member of the Authority shall execute a surety bond in the penal sum of twenty-five thousand dollars, and the secretary-treasurer shall execute a surety bond in the penal sum of fifty thousand dollars, each such surety bond to be conditioned upon the faithful performance of the duties of his office, to be executed by a surety company authorized to transact business in the commonwealth as surety and to be approved by the attorney general and filed in the office of the secretary of the commonwealth. The chairman of the Authority shall receive an annual salary of twelve thousand dollars and the other members shall each receive an annual salary of ten thousand dollars. Each member shall be reimbursed for his actual expenses necessarily incurred in the performance of

his duties. All expenses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under the authority of this act. St. 1952, c. 354, § 3.

14. DEFINITIONS. As used in this act, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:—

(a) The word "Authority" shall mean the Massachusetts Turnpike Authority, created by section three of this act, or, if said Authority shall be abolished, the board, body or commission succeeding to the principal functions thereof or to whom the powers given by this act to the Authority shall be given by law.

(b) The word "turnpike" shall mean the express toll highway or such part or parts thereof as may be constructed under the provisions of this act, together with and including all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, connecting highways, service stations, restaurants and administration, storage and other buildings and facilities which the Authority may deem necessary to the operation of the turnpike, together with all property, rights, statements and interests which may be acquired by the Authority for the construction or the operation of the turnpike.

(c) The term "cost of the turnpike" shall embrace the cost of construction, the cost of the acquisition of all land, rights-of-way, property rights, easements and interests acquired by the Authority for such construction, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved,

the cost of all machinery and equipment, financing charges, interest prior to and during construction, and, if deemed advisable by the Authority, for one year after completion of construction, cost of traffic estimates and of engineering and legal expenses, plans, specifications, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the turnpike, administrative expenses, and such other expenses as may be necessary or incident to the construction of the turnpike, the financing of such construction and the placing of the turnpike in operation. Any obligation or expenses hereafter incurred by the state department of public works with approval of the Authority for traffic surveys, borings, preparation of plans and specifications, and other engineering srevices in connection with the construction of the turnpike shall be regarded as a part of the cost of the turnpike and shall be reimbursed to the commonwealth to the credit of the Highway Fund. St. 1952, c. 354, § 4.

§ 1-5. General Grant of Powers. The Authority is hereby authorized and empowered—

(a) To adopt by-laws for the regulation of its affairs and the conduct of its business;

(b) To adopt an official seal and alter the same at pleasure;

(c) To maintain an office or offices at such place or places within the commonwealth as it may determine;

(d) To sue and be sued in its own name, plead and be impleaded;

(e) To construct, reconstruct, maintain, repair and operate the turnpike or any part or parts thereof as it may determine, and the provisions of chapter ninety-one of the General Laws shall not apply to the construction by the Authority of structures in, on or over rivers, streams and

waterways; provided, that for drainage areas greater than one thousand acres the said structures shall be designed to pass a rare flood as computed by the Kinnison-Colby formula, and for drainage areas of one thousand acres of less, the said structures shall be designed to meet the requirements of the "Massachusetts Turnpike Drainage Standards" dated June fourth, nineteen hundred and fifty-four.

(f) To acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine;

(g) To issue turnpike revenue bonds of the Authority for any of its corporate purposes, payable solely from the tolls and revenues pledged for their payment, and to refund its bonds, all as provided in this act;

(h) To fix and revise from time to time and charge and collect tolls for transit over the turnpike, and it shall upon request furnish a user of the turnpike a toll receipt showing the amount of toll paid; the classification of the vehicle and the date and place of exit from said turnpike.

(i) To establish rules and regulations for the use of the turnpike not repugnant to the provisions of the General Laws made applicable thereto by section fifteen, and to provide penalties for the violation of said rules and regulations not exceeding fifty dollars for each offence, which may be recovered by indictment or by complaint before a district court and shall be accounted for and paid to the Authority;

(j) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

(k) To acquire in the name of the Authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power

of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws or any alternative method now or hereafter provided by general law, in so far as such provisions may be applicable, such public lands, parks, playgrounds, reservations, cemeteries, highways or parkways, or parts thereof or rights therein, and any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike; provided, however, that whenever a parcel of private property so taken is used in whole or part for residential purposes, the owner or owners of said parcel may, within thirty days of the date of the Authority's notice to vacate such parcel, appeal to the Authority for a postponement of the date set for vacating, whereupon the Authority shall grant to the owner or owners of the property a postponement of three months from the date of such appeal; provided, however, that the appeal for such postponement shall be in the form of a written request to the Authority sent by registered mail, return receipt requested; and provided, further, that the Authority shall give security to the state treasurer, in such amount and in such form as may be determined by the state department of public works, for the payment of such damages as may be awarded in accordance with law for such taking, and that the provisions of section forty of said chapter seventy-nine, in so far as the same may be applicable, shall govern the rights of the Authority and of any person whose property shall be so taken;

(l) To designate the location, and establish, limit and control such points of ingress to and egress from the turnpike as may be necessary or desirable in the judgment of the Authority to insure the proper operation and maintenance

of the turnpike, and to prohibit entrance to the turnpike from any point or points not so designated;

(m) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act;

(n) To employ consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation;

(o) To receive and accept from any federal agency grants for or in aid of the consruction of the turnpike, and to receive and accept aid or contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made; and

(p) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act. St. 1952 c. 354, § 5, as amended St. 1955, c. 213; St. 1955, c. 653, § 1; St. 1957, c. 728, § 4.

§ 1-6. State Highways. The Authority may, with the approval of the state department of public works, incorporate in the turnpike any existing state highway or part thereof or any partially completed state highway or any bridge which it may deem necessary for a proper alignment of the turnpike, and the actual cost thereof shall be reimbursed to the commonwealth to the credit of the Highway Fund from the proceeds of its turnpike revenue bonds. St. 1952, c. 354, § 6.

§ 1-7. Incidental Powers

The Authority shall have power to construct grade separation at intersections of the turnpike with public highways and to change and adjust the lines and grades of such highways so as to accommodate the same to the design of

such grade separation. The cost of such grade separations and any damage incurred in changing and adjusting the lines and grades of such highways shall be ascertained and paid by the Authority as a part of the cost of the turnpike.

If the Authority shall find it necessary to change the location of any portion of any public highway, it shall reconstruct the same at such location as the Authority shall deem most favorable, with the approval of the state department of public works, and of substantially the same type and in as good condition as the original highway. The cost of such reconstruction and any damage incurred in changing the location of any such highway shall be ascertained and paid by the Authority as a part of the cost of the turnpike. In exercising the power herein granted, the Authority may take private property in the name of a city or town by exercise of the power of eminent domain as provided in chapter seventy-nine of the General Laws.

Any public highway affected by the construction of the turnpike may be vacated or relocated by the Authority and any damages awarded on account thereof shall be paid by the Authority as a part of the cost of the turnpike.

In addition to the foregoing powers the Authority and its authorized agents and employees may enter upon any lands, waters and premises in the commonwealth for the purpose of making surveys, soundings, drilling and examinations as they may deem necessary or convenient for the purposes of this act, and such entry shall not be deemed a trespass, nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may be then pending. The Authority shall make reimbursement for any actual damage resulting to such lands, waters and premises as a result of such activities.

The Authority shall also have power to make reasonable regulations including the authority to grant easements for the installation, construction, maintenance, repair, renewal,

relocation and removal of tracks, pipes, pipelines, mains, conduits, cables, wires, towers, poles and other equipment and appliances of any public utility, or of any corporation or person owning or operating pipelines in, on, along, over or under the turnpike. Whenever the Authority shall determine that it is necessary that any such facilities which now are, or hereafter may be located in, on, along, over or under the turnpike should be relocated in the turnpike, or should be removed from the turnpike, the public utility, corporation or person owning or operating such facilities shall relocate or remove the same in accordance with the order of Authority. In case of any such relocation or removal of facilities, the public utility, corporation or person owning or operating the same, its successors or assigns, may maintain and operate such facilities, with the necessary appurtenances, in the new location or new locations, for as long a period, and upon the same terms and condition as it had the right to maintain and operate such facilities in their former location or locations.

The Authority shall have power, in the process of constructing or reconstructing all or any part of the turnpike or any extension thereof or additions thereto, to take by eminent domain pursuant to chapter seventy-nine of the General Laws, such land abutting the turnpike as it may deem necessary or desirable for the purposes of removing or relocating all or any part of the facilities of any public utility, including rail lines, and may thereafter lease the same or convey an easement or any other interest therein to such utility company upon such terms as it, in its sole discretion, may determine. The relocation of the facilities of any public utility, including rail lines, in accordance with the provisions of this section shall be valid upon the filing of the plans thereof with the department of public utilities and no general laws or other special laws, or parts thereof, shall be applicable to such relocation.

The commonwealth hereby consents to the use of all lands owned by it, including lands lying under water, which are deemed by the Authority to be necessary for the construction or operation of the turnpike.

The Authority may sell the buildings or other structures upon any lands taken by it, or may remove the same, and shall sell, if a sale be practicable, or if not, shall lease, if a lease be practicable, any lands or rights or interest in lands or other property taken or purchased for the purposes of this act, whenever the same shall, in the opinion of the Authority, cease to be needed for such purposes. The proceeds of any such sale or lease shall be applied toward the cost of the turnpike or deposited to the credit of the sinking fund for the turnpike revenue bonds issued under the provisions of this act.

The Authority may place and maintain or may grant permission by easement or otherwise to any corporation or person to place and maintain on or under or within the turnpike ducts, pipes, pipelines, wires or other structures, to be so located as not to interfere with the safe and convenient operation for such permission on such terms and conditions as may be fixed by the Authority. The construction, maintenance and repairs of any such ducts, pipes, pipelines, wire or other structures shall be subject to such directions and regulations as the Authority may impose. As amended St. 1958, c. 384, §§ 1-3.

Emergency. Approved June 10, 1958.

§ 1-8. Turnpike Revenue Bonds. The Authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of turnpike revenue bonds of the Authority for the purpose of paying all or any part of the cost of the turnpike or any part or parts thereof. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such

payment. The bonds shall be dated, shall bear interest at such rate or rates, not exceeding five per centum per annum, shall mature at such time or times not exceeding forty years from their date or dates, all as may be determined by the Authority, and may be made redeemable before maturity, at the option of the Authority, at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of the bonds. The Authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the commonwealth. The bonds shall be signed by the chairman of the Authority or shall bear his facsimile signature, and shall bear a facsimile of the official seal of the Authority, attested by the secretary-treasurer of the Authority, and any coupons attached thereto shall bear the facsimile signature of the chairman of the Authority. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. All bonds issued under the provisions of this act shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the commonwealth. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The Authority may sell such bonds

in such manner, either at public or at private sale, and for such price, as it may determine to be for the best interests of the Authority, but no such sale shall be made at a price so low as to require the payment of interest on the money received therefor at more than five per centum per annum, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values, excluding, however, from such computation the amount of any premium to be paid on redemption of any bonds prior to maturity.

The proceeds of the bonds shall be used solely for the payment of the cost of the turnpike, and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such bonds or in the trust agreement hereinafter mentioned securing the same. If the proceeds of the bonds initially issued, by error of estimates or otherwise, shall be less than such cost, additional bonds may in like manner be issued to provide the amount of such deficit, and, unless otherwise provided in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued. If the proceeds of the bonds shall exceed such cost, the surplus shall be deposited to the credit of the sinking fund for such bonds.

Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost. Bonds may be issued under the provisions of this act without obtaining the consent of any department, division, commission, board,

bureau or agency of the commonwealth, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by this act. St. 1952, c. 354, §8.

§ 1-9. Trust Agreement. In the discretion of the Authority the bonds issued under the provisions of this act may be secured by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the commonwealth. Such trust agreement or resolution providing for the issuance of such bonds may pledge or assign the tolls and other revenues to be received, but shall not convey or mortgage the turnpike or any part thereof. Such trust agreement or resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisition of property and the construction, improvement, maintenance, repair, operation and insurance of the turnpike, the rates of toll to be charged, and the custody, safeguarding and application of all moneys. It shall be lawful for any bank or trust company incorporated under the laws of the commonwealth which may act as depositary of the proceeds of bonds or of revenues to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Such trust agreement may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders. In addition to the foregoing, such trust agreement or resolution may contain such other provisions as the Authority may deem reasonable and proper for the security

of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of the operation of the turnpike. St. 1952, c. 354, § 9.

§ 1-10. Revenues

The Authority is hereby authorized to fix, revise, charge and collect tolls for the use of the turnpike and the different parts or sections thereof, and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right of way adjoining the paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages and restaurants, or for any other purpose, and to fix the terms, conditions, rents and rates of charges for such use. Such tolls shall be so fixed and adjusted in respect of the aggregate of tolls from the turnpike as to provide a fund sufficient with other revenues, if any, to pay (a) the cost of maintaining, repairing and operating the turnpike and (b) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserves for such purposes. Such tolls shall not be subject to supervision or regulation by any department, division, commission, board, bureau or agency of the commonwealth or any political subdivision thereof. The tolls and all other revenues derived from the turnpike, except such part thereof as may be necessary to pay such cost of maintenance, repair and operation and to provide such reserves therefor as may be provided for in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement in a sinking fund which is hereby pledged to, and charged with, the payment of the principal of and the interest on such bonds as the same shall become due, and the redemption price or the purchase price of bonds retired by call or

purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made; the tolls or other revenues or other moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of moneys to the credit of such sinking fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Except as may otherwise be provided in such resolution or such trust agreement, such sinking fund shall be a fund for all such bonds without distinction or priority of one over another. As amended St. 1958, c. 384, § 4.

§ 1-11. Trust Funds. All moneys received pursuant to the authority of this act, whether as proceeds from the sale of bonds or as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this act. The resolution authorizing the bonds or the trust agreement securing such bonds shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this act and such resolution or trust agreement may provide. St. 1952, c. 354, § 11.

§ 1-12. Remedies. Any holder of bonds issued under the provisions of this act or any of the coupons appertaining thereto, and the trustee under any trust agreement, except

to the extent the rights herein given may be restricted by such trust agreement, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the commonwealth or granted hereunder or under such trust agreement or resolution authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by this act or by such trust agreement or resolution to be performed by the Authority or by any officer thereof, including, the fixing, charging and collecting of tolls St. 1952, 354, § 12.

§ 1-13. Exemption From Taxation. The exercise of the powers granted by this act will be in all respects for the benefit of the people of the commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of the turnpike by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay taxes or assessments upon the turnpike or any property acquired or used by the Authority under the provisions acquired or upon the income therefrom, and the bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation within the commonwealth. St. 1952, c. 354, § 13.

§ 1-14. Bonds Eligible for Investment. Bonds issued by the Authority under the provisions of this act are hereby made securities in which all public officers and public bodies of the commonwealth and its political subdivisions, all insurance companies, trust companies in their commercial departments and within the limits set by section forty of chapter one hundred and seventy-two of the General Laws;

banking associates, investments companies, executors, trustees and other fiduciaries, and all other persons whatsoever who are now or may hereafter be authorized to invest in bonds or other obligations of a similar nature may properly and legally invest funds, including capital in their control or belonging to them, and such bonds are hereby made obligations which may properly and legally be made eligible for the investment of savings deposits and the income thereof in the manner provided by clause 15 (c) of section fifty-four of chapter one hundred and sixty-eight of the General Laws. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the commonwealth for any purpose for which the deposit of bonds or other obligations of the commonwealth is now or may hereafter be authorized by law. St. 1932, c. 354, § 14.

§ 1-15. Miscellaneous

The turnpike when constructed and open to traffic shall be maintained and kept in good condition and repair by the Authority. The turnpike shall also be policed and operated by such force of police, toll-takers and other operating employees as the Authority may in its discretion employ.

All private property damaged or destroyed in carrying out the powers granted by this act shall be restored or repaired and placed in its original condition as nearly as practicable, or adequate compensation made therefor, out of funds provided under the authority of this act.

All counties, cities, towns and other political subdivisions and all public agencies and commissions of the commonwealth, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant or convey to the Authority at its request upon such terms and

conditions as the proper authorities of such counties, cities, towns, political subdivisions, agencies or commissions of the commonwealth may deem reasonable and fair and without the neccessity for any advertisement, order of court or other action or formality, other than the regular and formal action of the authorities concerned, any real property which may be necessary or convenient to the effectuation of the authorized purposes of the Authority, including public roads and other real property already devoted to public use.

Until the turnpike shall have become a part of the state highway system under the provisions of section seventeen of this act, the Authority shall be liable to any person sustaining bodily injury or damage in his property by reason of a defect or want or repair therein or thereupon to the same extent as though the turnpike were a way within the meaning of sections fifteen, eighteen and nineteen of chapter eighty-four of the General Laws, and shall be liable for the death of any person caused by such defect or want of repair to the same extent as is provided in chapter two hundred and twenty-nine of the General Laws. Any notice of such injury, damage or death required by law shall be given to any member of the Authority or to the secretary-treasurer.

Until the turnpike shall have become a part of the state highway system, it shall be deemed to be a way within the meaning and purport of sections two, four A, four B and five of chapter eighty-nine of the General Laws, and sections three A, three B, three C, six, seven, nine, ten, eleven, twelve, thirteen, fourteen, fourteen B, sixteen, the first sentence of section seventeen, section twenty, the first sentence of section twenty-one, sections twenty-three, twenty-four, twenty-six and thirty-four J of chapter ninety of the General Laws.

Any operator of a vehicle using the turnpike who refuses

to pay the toll prescribed by the Authority, or who evades or attempts to evade payment of the toll prescribed by the Authority, may be arrested without a warrant.

Any person damaged in his property by the exercise of any of the powers granted by this act may recover his damages from the Authority under chapter seventy-nine of the General Laws.

On or before the thirtieth day of January in each year the Authority shall make an annual report of its activities for the preceeding calendar year to the governor and to the general court. Each such report shall set forth a complete operating and financial statement covering its operations during the year. The Authority shall cause an audit of its books and accounts to be made at least once in each year by certified public accountants, and the cost thereof may be treated as a part of the cost of construction or operation of the turnpike. Such audits shall be deemed to be public records within the meaning of chapter sixty-six of the General Laws.

Notwithstanding the provisions of chapters one hundred and thirty-four and one hundred and forty-seven of the General Laws, if money, goods or other property which has been abandoned, mislaid or lost on the premises of the Massachusetts Turnpike Authority comes into the possession of said Authority and remains unclaimed in its posession for a period of one hunderd and twenty days, the Authority may sell the same, excepting money so unclaimed, at public auction after notice of such sale has been published for three successive weeks in a newspaper published in the city or town where such sale is to take place. The net proceeds of such sale, after deducting the cost of storage and the expenses of the sale, and all money so unclaimed, shall be paid into and become the property of the Authority. If, in the opinion of the Authority any property so abandoned, mislaid or lost which comes into the posses-

sion of the Authority and remains unclaimed in its possession for a period of one hundred and twenty days, is of the value of three dollars or less, the Authority may donate the same to a charitable organization. As amended St. 1958, c. 200.

Emergency. Approved April 28, 1958.

§ 1-16. Turnpike Revenue Refunding Bonds. The Authority is hereby authorized to provide by resolution for the issuance of turnpike revenue refunding bonds of the Authority for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this act, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and, if deemed advisable by the Authority, for the additional purpose of constructing any additional portion or portions of the turnpike or improvements, extensions, or enlargements thereof. The issuance of such bonds, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Authority in respect of the same, shall be governed by the provisions of this act in so far as the same may be applicable. The issuance of turnpike revenue bonds or turnpike revenue refunding bonds under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds St. 1952, c. 354, § 16.

§ 1-17. Transfer to Commonwealth. When all bonds issued under the provisions of this act and the interest thereon shall have been paid of a sufficient amount for the payment of all such bonds and the interest thereon to the maturity thereof shall have been set aside in trust for the benefit of the bondholders, the turnpike, if then in good condition and repair to the satisfaction of the state department of public

works, shall become part of the state highway system and shall thereafter be maintained and operated by said department free of tolls as may be provided by law, and thereupon the Authority shall be disolved and all funds of the Authority not required for the payment of the bonds and of the interest thereon shall be paid into the treasury of the commonwealth for the credit of the Highway Fund and all machinery, equipment, and other property belonging to the Authority shall be vested in the commonwealth and delivered to the state department of public works. St. 1952, c. 354, § 17.

§ 1-18. Preliminary Expenses. To provide for the preliminary expenses of the Authority in carrying out the provisions of this act the sum of five hundred thousand dollars is hereby appropriated from the Highway Fund, which sum shall be paid to the Authority and, simultaneously with the delivery of the bonds, the sum so paid shall be reimbursed by the Authority to the commonwealth for the credit of the Highway Fund out of the proceeds of any bonds which may be issued by the Authority under the provisions of this act.

The Authority is hereby authorized and directed to make such surveys and studies of the turnpike as may be necessary to effect the financing authorized by this act at the earliest practicable time, and for this purpose to employ such consulting engineers, traffic engineers, legal and financial experts and such other employees and agents as it may deem necessary. To effect the purposes of this act the state department of public works shall make available to the Authority all data in the possession of the department which may be useful to the Authority in making such surveys and studies and the department may furnish such assistance in making investigations and in preparing designs for the turnpike project as may be agreed upon be-

tween the department and the Authority, the cost of such surveys and expenses incurred by the department to be paid by the Authority. St. 1952, c. 354, § 18.

§ 1-19. Liberal Construction of Act. This act, being necessary for the welfare of the commonwealth and its inhabitants, shall be liberally construed to effect the purposes thereof. St. 1952, c. 354, § 19.

§ 1-20. Constitutional Construction. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions. St. 1952, c. 354, § 20.

§ 1-21. Inconsistent Laws Inapplicable. All other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act. St. 1952, c. 354, § 21.

APPENDIX "C"

JUDGMENT

June 4, 1962

This cause came on to be heard upon defendants' motion to dismiss, and after consideration it is hereby ordered that the complaint be dismissed with costs taxed at $

By the Court

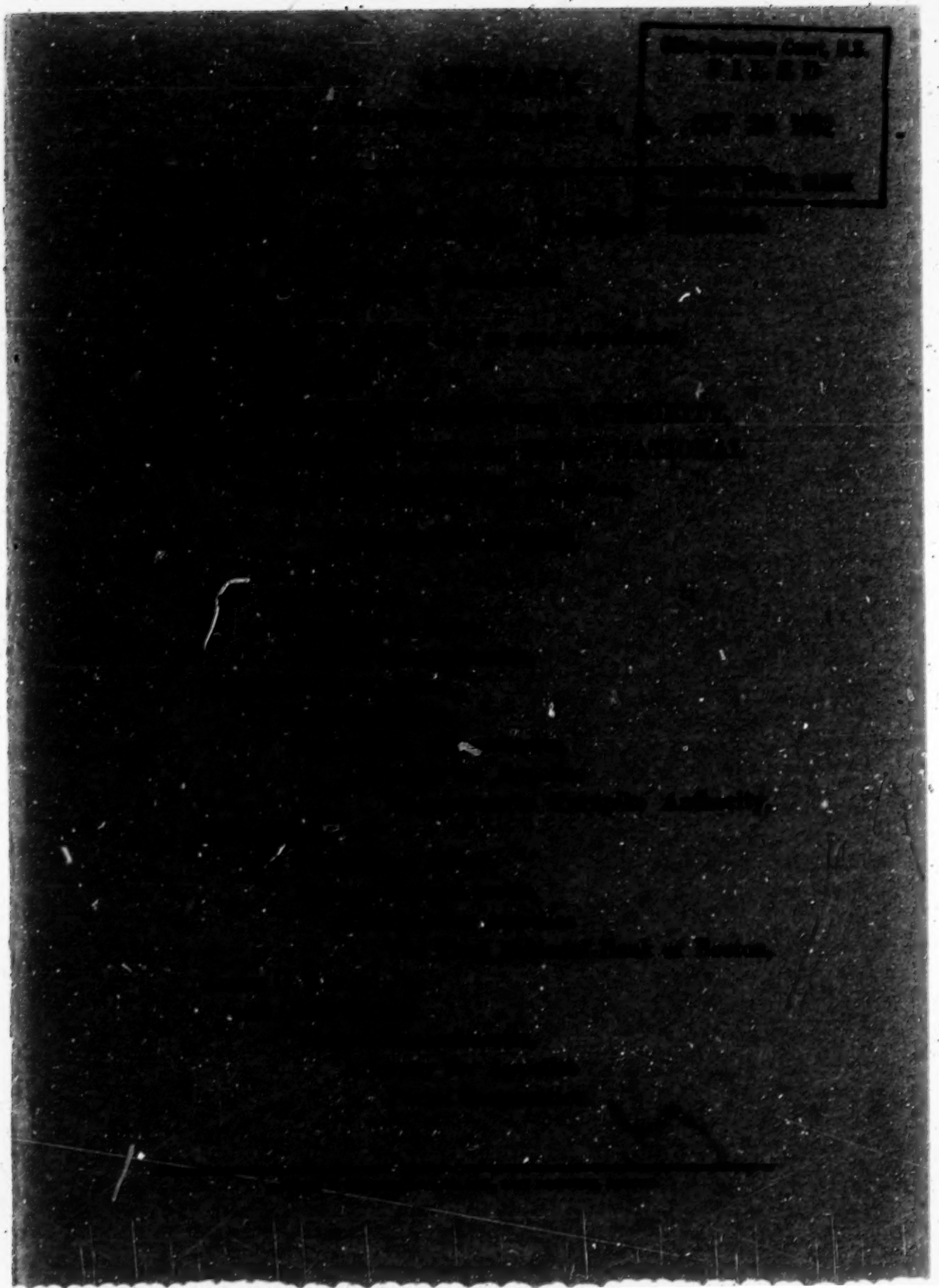
(s) Austin W. Jones, Jr.
Clerk

Judgment entered June 4, 1962
John A. Canavan, *Clerk*
by Grace V. Flood,
Deputy Clerk

(s) Bailey Aldrich
United States Circuit Judge

(s) Francis J. W. Ford
United States District Judge

(s) Andrew A. Caffrey
United States District Judge



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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 473.

HARRY K. AHOYIAN ET ALI., *Appellants*,

v.

MASSACHUSETTS TURNPIKE AUTHORITY ET ALS., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

APPELLEES' MOTION TO AFFIRM.

The appellees, pursuant to Rules 16(1)(c) and 35 of the Revised Rules of this Court, move that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinions Below.

This is an appeal from a judgment of a three-judge Court of the District of Massachusetts dated June 4, 1962. The District Court thereby dismissed an action in which the plaintiffs, eighteen property owners whose land had been taken, or was about to be taken by eminent domain,

sought as relief (*a*) to declare unconstitutional the Massachusetts Turnpike Act, chapter 354 of the Massachusetts Acts of 1952 as amended; (*b*) to declare takings of land thereunder "null and void and of no effect"; and (*c*) to enjoin, temporarily and permanently, any further proceedings by the Massachusetts Turnpike Authority, under that legislation, to construct an extension into the City of Boston of the existing trans-State Turnpike. The opinion dismissing the complaint, written for the unanimous three-judge Court by Circuit Judge Bailey Aldrich, is printed in the appellants' Jurisdictional Statement at pages 13-17.

A prior order denying the plaintiffs' application for a temporary restraining order, made on May 9, 1962, by United States District Judge Ford, of the District of Massachusetts, is not printed in the appellants' Statement. It is printed at page 26 hereof.

A memorandum denying a motion of the plaintiffs to vacate the June 4 judgment, denying plaintiffs' motion to grant plaintiffs a rehearing, and denying plaintiffs' motion to alter or amend the June 4 judgment, is not printed in the appellants' Statement. This order was dated June 21, 1962. It is printed at page 27 hereof.

An order denying a preliminary injunction, sought by Hyman Radler, one of the plaintiffs herein, in a separate Massachusetts Superior Court case raising the same issues as those in the instant federal case, is referred to at pages 9-10 of the appellants' Statement, but is not printed therein. This order was made on July 10, 1962, by Judge Tauro of the Massachusetts Superior Court. Judge Tauro's order is printed at page 28 hereof.

An opinion of the Massachusetts Superior Court in that action, dated September 19, 1962 which sustained certain special demurrers to various allegations of the State Court complaint and upheld the defendants' plea of *res judicata*, is described at pages 9-10 of the appellants' Statement, but

is not printed therein. That opinion, by Tauro, J., is printed at pages 28-31 hereof.

Questions Presented.

The statement of appellants (pp. 4, 5) lists twelve numbered questions as presented on this appeal. The appellees Massachusetts Turnpike Authority and others suggest that the Supreme Court may be assisted by a somewhat simpler statement of the substance of the questions, as the appellees see the case. They are as follows:

1. Is equal protection of the laws or due process of law denied under the Massachusetts Turnpike Act because there is no provision for public hearings on the laying out of the Turnpike between terminal points directed by the Legislature, when public hearings are required for the laying out by a commission of other state highways generally with no legislative directions of any kind as to any particular one?

2. Did the District Court err when it held that the plaintiffs must seek and exhaust the administrative procedures afforded by Massachusetts law for requiring the defendant Turnpike Authority to post security for land-takings, before the plaintiffs will be in a position to contend in court that the Turnpike Act gave them inadequate assurance of payment for their land?

The Turnpike Act and Construction Thereunder.

The original Massachusetts Turnpike Act, chapter 354 of the Acts of 1952, created the Massachusetts Turnpike Authority and empowered it to construct and maintain a toll express highway from a point "in the vicinity of the city of Boston" on the east to a point in or near to the boundary of the State of New York on the west (sec. 1, Jurisdictional Statement, p. 18). The construction of the Turnpike so

authorized, from the New York State line to the Boston suburb of Weston, 123 miles in length, has long since been completed, and from the spring of 1957 the toll expressway so built has carried an immense volume of passenger and commercial traffic across Massachusetts.

Before construction of the original Turnpike was begun the Governor and Council asked the Supreme Judicial Court of the Commonwealth for an advisory opinion as to whether the delegation of powers to the Authority was constitutional. The Justices ruled that it was (*Opinion of the Justices*, 330 Mass. 713; Appendix, *infra*, pp. 10-25).

In 1955 the Legislature inserted in section 1 of the Turnpike Act the words "or from a point or points within said city" to permit the construction by the Turnpike Authority of an extension (known as the "Boston Extension") which would carry the Turnpike from its present eastern terminus at Weston to a point within the city. This amendment raised no additional constitutional questions (see footnote to the District Court's Opinion, Jurisdictional Statement, p. 14).

Bondholders have loaned to the Authority for the Boston Extension $180,000,000, which is held by the defendant The First National Bank of Boston as Trustee (Opinion, Jurisdictional Statement, pp. 13, 14). The Authority has power to issue additional bonds if this sum is insufficient (footnote to Opinion, Jurisdictional Statement, at p. 16). Of this sum $22,750,000 has been put by the Trustees in a "right-of-way account" established to pay for the takings including the lands of the appellants (Jurisdictional Statement, p. 8, footnote).*

*The affidavit referred to in the footnote also stated (what the appellants' footnote omits) that The First National Bank of Boston has posted a bond for that amount—$22,750,000—with the State Treasurer, as security for payment of land damages, in compliance with section 5(*k*) of the Turnpike Act, quoted at p. 24 of the Jurisdictional Statement.

Construction of the Boston Extension, which adds only 12 miles to the original 123, had already been begun by the Turnpike Authority and its contractor, the defendant Perini Corporation, before the filing of the complaint (as alleged therein).

Reasons for Granting the Motion to Affirm.

1. AS TO THE APPELLANTS' CONTENTION THAT THE TURNPIKE LEGISLATION DENIES THEM EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW IN ITS EMINENT DOMAIN PROCEDURES.

In *Benz* v. *New York State Thruway Authority*, 369 U.S. 147 (1962), this Court held that provision of procedures for eminent domain to take land for a highway comparable to the Massachusetts Turnpike does not, simply because different from other eminent domain procedures, thereby deny equal protection or due process.

In *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, 584, this Court laid down the rule:

> "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

An imposing list of authorities applying this principle is assembled by Brandeis, J., in his dissenting opinion in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, at p. 42.

The District Court properly applied this principle in this case (Opinion, Jurisdictional Statement, at p. 14):

> ". . . Apart from equal protection, viz., that this is an unlawful discrimination, plaintiffs do not claim a constitutional right to a public hearing. We see ade-

quate distinguishing circumstances. The general statute, which grants the [highway] commission authority to lay out highways, gives no directions of any kind as to any particular one, whereas the present Act, of course, does. There is a difference between a road to be determined by a commission and one designated by the legislature. We do not see any unlawful delegation in permitting the Authority to make the final ministerial selection of the exact path . . ."

The *Opinion of the Justices*, 330 Mass. 713, had held in 1953 that the delegation of authority to the Turnpike Authority to lay out the Turnpike between the terminal points specified by the Legislature was constitutional (Appendix, *infra*, pp. 10-25, especially at pp. 14-16).

Plaintiffs' contention that they have no recourse to judicial review of the constitutionality and legality of land takings by the Authority cannot be seriously considered, in the light of *Luke* v. *Massachusetts Turnpike Authority*, 337 Mass. 304 (1958), wherein the Supreme Judicial Court passed upon the constitutionality and legality of a taking on a petition for a declaratory judgment.

The appellants' claim on this point merits no further argument.

2. As to the appellants' contention that the District Court erred in holding that the plaintiffs must exhaust their administrative remedies afforded by Massachusetts law for obtaining adequate security for land-takings before challenging their constitutionality in this proceeding.

The District Court's ruling on this issue is contained in the last paragraph of its opinion (Opinion, Jurisdictional Statement, p. 17):

"This question, [whether section 40 of chapter 79 of the General Laws provides for adequate security] however, is premature. Before plaintiffs can raise any constitutional issues it is axiomatic that they must exhaust their administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 1938, 303 U.S. 41. Plaintiff's first move should have been to seek the relief offered by section 40 itself. *McCarthy* v. *Woburn Housing Authority*, 1960, 341 Mass. 539. If thereafter constitutional infirmities appear in this regard—whether 'thereafter' includes seeking relief in the state courts we do not intimate—it will be time enough to consider them."

The opinion of this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938), supports the action of the District Court.

McCarthy v. *Woburn Housing Authority*, 341 Mass. 539, cited by the District Court, took the same view of the law in ruling on this very section 40 of chapter 79, as incorporated into the Housing Authority statute, holding that the sole remedy for a person who claimed that the Authority had not deposited sufficient security to guarantee the damages for the taking of his land was to apply for his administrative remedy under section 40, and that, not having availed himself of that remedy, he could not raise the issue on a writ of entry.

In *Radler* versus these same defendants (referred to *supra*, p. 2) the Superior Court judge sustained demurrers to similar allegations, on the same ground, that plaintiffs had not had recourse to their administrative remedy (see Appendix B, *infra*, p. 29).

The three-judge Court held that the administrative remedy under section 40 was available to the plaintiffs

(Opinion, Jurisdictional Statement, p. 16), and the Turnpike statute expressly so provides (§ 5(k) at p. 24 of Jurisdictional Statement, quoted in the Court's Opinion, Jurisdictional Statement, p. 15).

The appellants have at no time sought recourse to the administrative channels provided, either to attempt to demonstrate that the total sum of $22,750,000 was inadequate, or that the total sum of $180,000,000 raised for the project will be insufficient to pay for the land and other expenses of construction, or to demonstrate that there is any need of the segregation of a separate fund to cover the value of their respective premises.

The appellants' claim in this point merits no further argument.

An additional, and equally substantial, reason for affirming the judgment below is the entire absence from the appellants' statement of any showing of abuse of discretion in the denial of injunctive relief below.

A great public improvement, to carry the existing Massachusetts Turnpike from its present eastern terminus in Weston, outside the City of Boston, into the center of the city, is now under construction. A general redevelopment of the central part of the City of Boston is in progress, of which the Turnpike's Boston Extension is an integral part.

Some aspects of this large operation are discussed by the Massachusetts Supreme Judicial Court in *Dodge v. Prudential Insurance Co. of America,* 1961 Adv. Sh. 1473, 179 N.E. 2d 234 (Dec. 20, 1961). Although the Boston extension of the Turnpike is now well under way, with preparation of the ground by demolition and by initiated construction, appellants here seek to enjoin its construction on

the undemonstrated theory that they would not get paid a reasonable compensation for their land which was taken for the project. They ask the Court to enjoin the carrying out of this entire project without ever turning to the Massachusetts administrative bodies which are charged with the duty of seeing that their security for payment is adequate. The District Court committed no error in the judgment here appealed from by refusing to enjoin this great project on such grounds.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

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Appendix A.

OPINION OF THE JUSTICES TO THE GOVERNOR AND COUNCIL, 330 MASS. 713.

On June 12, 1953, the Justices submitted the following answers to questions propounded to them by the Governor and Council.

To His Excellency the Governor and The Honorable Council of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit these answers to the questions contained in your order adopted May 21, 1953, and transmitted to us May 25, 1953. A copy of the order and of chapter 354 of the Acts of 1952, to which the order refers, are attached hereto.

For a proper understanding of the questions and of our answers it is necessary to keep in mind the general nature and certain outstanding features of the statute which has given rise to the doubts expressed in the order. The purpose of the statute, as stated in its title, is "the construction, maintenance, repair and operation of a self-liquidating express highway from a point in the vicinity of the city of Boston to a point at or near the New York State line." To accomplish this purpose the statute sets up as "a public instrumentality" a body politic and corporate to be known as the Massachusetts Turnpike Authority to consist of three members to be appointed by the Governor with the advice and consent of the Council. § 3. The authority is authorized and empowered to construct, maintain, repair, and operate the proposed highway as a toll express highway, to be known as the Massachusetts Turnpike, between the termini as stated in the title and at such location as may be approved by the State department of public works, and to finance the turnpike by issuing bonds of the authority

payable solely from revenues of the turnpike. § 1. § 5 (g). § 8. § 16. Great care is taken to make clear that neither the credit of the Commonwealth nor that of any of its political subdivisions is pledged for payment of the bonds. § 2. The authority is authorized, among other things, to designate the locations and to establish, limit, and control the points of ingress to and egress from the turnpike and to prohibit entrance from points not so designated (§ 5 [1]); and to fix and collect tolls for the use of the turnpike and the different parts or sections thereof. § 10. Under the head of "Incidental Powers" it is further authorized to construct grade separations at intersections; to reconstruct any public highway the location of which it shall find it necessary to change; to vacate or relocate in the manner provided by law any public highway affected by the construction of the turnpike; to enter upon lands, waters, and premises for the purpose of surveys, soundings, drillings, and examinations, making reimbursement for any actual damage resulting therefrom; to make reasonable regulations, including the granting of easements for public utilities and pipe lines, and to order their relocation or removal; to sell or remove buildings or other structures upon lands taken; and to place and maintain or grant permission or easements for ducts, pipes, pipe lines, wires or other structures, and to contract for such permission. § 7. It is further provided that authority shall, when practicable, sell or, if not practicable, shall lease, if a lease be practicable, property taken or purchased and no longer needed. § 7. When all of the bonds shall have been paid or payment provided for, the turnpike is to become part of the State highway system, and the authority is to be dissolved. § 17.

In addition to the provisions of the statute to which reference has been made certain other provisions are so immediately related to the questions and answers that it seems advisable either to quote from them or to summarize

them in greater detail. Thus by § 4 (b) the word "turnpike" is defined as including not only "the express toll highway," or such parts thereof as may be constructed under the act, but also "all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, connecting highways, service stations, restaurants and administration, storage and other buildings and facilities which the Authority may deem necessary for the operation of the turnpike." By § 5 (f) the authority is authorized "To acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine." By § 5 (k) the authority is authorized "To acquire in the name of the Authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws . . . any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike. . . ." By § 10 the authority is authorized "to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages and restaurants, or for any other purpose except for tracks for railroad or railway use, and to fix the terms, conditions, rents and rates of charges for such use." Section 20 reads as follows: "The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the

decision of such court shall not affect or impair any of the remaining provisions."

The questions contained in the order are these:

"1. Is the general grant of powers to the Massachusetts Turnpike Authority, as set forth in Sections 1, 5 and 7 of Chapter 354 of the Acts of 1952, a constitutional delegation of authority by the General Court?

"2. Does paragraph (f) of said Section 5 providing for the acquisition of 'sites abutting on the turnpike' for the purposes therein set forth, or paragraph (k) providing for the acquisition by eminent domain of 'any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike,' contravene any provision of Article X of Part the First of the Constitution of the Commonwealth?

"3. If there is any unconstitutional delegation of certain powers to the Massachusetts Turnpike Authority by the General Court, would such unconstitutional delegation render said Chapter 354 of the Acts of 1952 unconstitutional in its entirety, in view of Section 20 of said Chapter 354?

"4. Is Chapter 354 of the Acts of 1952 a constitutional exercise of legislative power?"

The doubts which inspired these questions seem to have arisen chiefly, if not wholly, because of the language of art. 10 of the Declaration of Rights as amended by the addition of the last sentence by art. 39 of the Amendments. Article 10 as amended reads, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the

expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. [The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.]" For convenience we have set off in brackets the words added by the amendment.

Long before the amendment to art. 10 the delegation by the Legislature to counties, cities, and towns of the general power to take lands by eminent domain for the purpose of ways and other public purposes without description or specification in the enabling act of the lands to be taken had become a commonplace. It had also become recognized and fairly common practice before the subjects were covered by general laws for the Legislature to delegate to private corporations such as canal companies, turnpike companies and railroads power to exercise rights of eminent domain for the public purpose of promoting the transpor-

tation of persons and goods between termini and by routes often described with no greater particularity than is done in the statute now under consideration.[1] A railroad charter of this type came under the examination of this court in *Boston Water Power Co.* v. *Boston & Worcester Rail Road*, 23 Pick. 360, 395-396, and the delegation of the power of eminent domain was held constitutional and valid. Other illustrations in our decisions are found in *Springfield* v. *Connecticut River Railroad*, 4 Cush. 63, 69-70, *Brigham* v. *Agricultural Branch Railroad*, 1 Allen, 316, *Fall River Iron Works Co.* v. *Old Colony & Fall River Railroad*, 5 Allen, 221, and *Housatonic Railroad* v. *Lee & Hudson Railroad*, 118 Mass. 391, 392-393. See *Boston & Providence Railroad* v. *Midland Railroad*, 1 Gray, 340; *Brayton* v. *Fall River*, 124 Mass. 95, 96-97; *Codman* v. *Crocker*, 203 Mass. 146, 154-155; *Lynch* v. *Forbes*, 161 Mass. 302, 308-309. In the present general laws applicable to railroads considerable latitude still remains in the railroad to select its route, subject to control by designated public authorities. G. L. (Ter. Ed.) c. 160, §§ 18-21, § 80.

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[1] See *Opinion of the Justices*, 250 Mass. 591, 596; St. 1791, c. 57 (Massachusetts Canal); St. 1793, c. 21 (Middlesex Canal); St. 1795, c. 21 (Cumberland Canal); St. 1796, c. 5 (First Massachusetts Turnpike Corporation); St. 1796, c. 72 (Second Massachusetts Turnpike Corporation); St. 1799, c. 48 (Eighth Massachusetts Turnpike Corporation); St. 1829, c. 12 (Providence and Bristol Turnpike Corporation); St. 1829, c. 26 (Worcester Rail Road Company); St. 1829, c. 93 (Franklin Rail Road Company); St. 1829, c. 94 (Massachusetts Rail Road Corporation); St. 1829, c. 95 (Boston, Providence and Taunton Rail Road Corporation); St. 1830, c. 4 (Boston and Lowell Rail Road Corporation); St. 1831, c. 56 (Boston and Providence Rail-Road Corporation); St. 1831, c. 57 (Boston and Ontario Rail Road Corporation); St. 1832, c. 97 (Pittsfield and West Stockbridge Rail Road Company); St. 1833, c. 109 (Andover and Wilmington Rail Road Corporation); St. 1833, c. 116 (Western Rail Road Corporation). The foregoing list is not intended to be complete.

These are simply instances falling within the recognized principle that the Legislature, having adopted a policy, may delegate the working out of the details of that policy. See *Commonwealth* v. *Hudson*, 315 Mass. 335, 341; *Scannell* v. *State Ballot Law Commission*, 324 Mass. 494, 501-502; *Treasurer of Worcester* v. *Department of Labor & Industries*, 327 Mass. 237, 241. *Springfield Institution for Savings* v. *Worcester Federal Savings & Loan Association*, 329 Mass. 184.

From what has been said we think it sufficiently appears that if art. 10 of the Declaration of Rights had not been amended by art. 39 of the Amendments in the manner indicated by the brackets inserted in the amended art. 10 as above quoted, there would be no serious question as to the power of the Legislature in general to delegate rights of eminent domain to the Massachusetts Turnpike Authority for the purpose of constructing a great highway. If such rights can be delegated to a private corporation serving the public such as a railroad or other public service corporation it would be difficult to see why art. 10, as unamended, or anything else in the Constitution, would stand in the way of a similar delegation to a public corporation like the authority the members of which are appointed by the Governor. Such delegation by the Legislature would be a sufficient "consent" of "the representative body of the people" to comply with the requirement of such consent for the taking of private property contained in the second sentence of art. 10.

It next becomes necessary to examine the amendment to art. 10 added by art. 39 of the Amendments to ascertain its exact meaning in restricting or enlarging the legislative power of delegation, and this examination must be made in the light of the public exigency which called forth the amendment. *General Outdoor Advertising Co. Inc.* v. *De-*

partment of Public Works, 289 Mass. 149, 158. *Opinion of the Justices*, 324 Mass. 746, 749.

It appears from *Opinion of the Justices*, 204 Mass. 607, and *Opinion of the Justices*, 204 Mass. 616, that in the early part of the year 1910, as a result of a report of the joint board on metropolitan improvements which had been created the preceding year, the Legislature had before it a proposal for the construction for commercial purposes of a broad street or streets in the city of Boston which involved the taking of private lands on the sides of the proposed street or streets, not as part of such street or streets or to serve any purpose of such street or streets, but solely for the purpose of division into suitable lots to be sold to private owners under conditions designed to develop the location for commerce, trade, and industry. The Justices gave their opinion that private lands could not be taken by eminent domain for the purpose of resale to other private owners with the object of promoting a commercial development in the manner proposed. The Justices advised that this would be an unconstitutional use of the power of eminent domain and of public moneys for a purpose not public in character. Article 39 of the Amendments was adopted by the Legislatures of that same year and of the year following and was approved and ratified by the people on November 7, 1911. The amendment, as hereinbefore quoted, expressly provides that the Legislature may, for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the Commonwealth, or by a county, city, or town, "of more land and property than are needed for the actual construction of such highway or street," provided that the land and property authorized to be taken are specified in the act "and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or streets." The amend-

ment further provides that the land not needed for the highway or street may be authorized to be sold with or without suitable restrictions. In our opinion the conclusion is practically inescapable that the design of this amendment was not to limit the power which the Legislature previously possessed under art. 10 to delegate the right of eminent domain but was to enlarge that power so as to allow the Legislature to do what the Justices had previously advised it could not do, that is, to authorize under certain carefully stated restrictions and limitations the taking of land not intended for purposes of the highway or street but intended for development of the locality.

It follows that the Legislature still possesses all the power of delegation held and frequently exercised by it before the amendment, and that the restrictions and limitations contained in the amendment apply only where the Legislature authorizes the taking of "more land and property than are needed for the actual construction of such highway or street." It becomes necessary therefore to determine whether by St. 1952, c. 354, the Legislature has attempted to authorize the taking of more land than is needed for the actual construction of the turnpike. If it has, since the statute does not comply with the limitations and restrictions of the amendment, the statute is invalid in so far as it relates to the taking of such additional land. And in determining whether the act does attempt to authorize the taking of more land than that needed for the turnpike we must first determine what are the component parts of the turnpike itself.

It is evident that this is to be no ordinary highway of the kind with which our history has made us familiar. It is an entirely new type of highway which has made its appearance only in comparatively recent years as a result of the many changes in the lives and customs of the people brought about by the introduction and general use of the automo-

bile. It will run practically the entire length of the main part of the State. It will doubtless consist of a number of paved lanes properly separated and graded to permit of safe operation at high speeds comparable perhaps to the speeds of passenger trains on railroads. It is to be expected that there will be few, if any, grade crossings. There are to be ingress and egress only at designated points, which in some instances may be miles apart. There will be signs, signals, and perhaps safety devices of one kind or another. There must be space along the sides of the main portion of the way to afford opportunity for slowing down or stopping or for disabled vehicles without interference with the general flow of traffic. In fact in some respects such a way more nearly resembles a new railroad system crossing the State than it resembles the traditional road leading from one town to another. It differs still more from the ordinary city street. Such a road cannot merely be constructed and opened to the public. It must be operated. This involves inspection, supervision, and a constant preparedness to remove obstructions and make necessary repairs. This in turn is likely to involve the use of road machinery, towing vehicles, snow plows, and sanding equipment, which must be kept in readiness and may have to be stored at proper places along the way. For all this buildings may be required, as well as a reasonable provision for garages where necessary repairs can be made both upon the equipment of the turnpike and in order to keep the vehicles of travellers in operable condition. Similarly it will be necessary to provide gasoline stations at reasonable intervals. These auxiliary structures bear a relation to the turnpike similar to that which the switch towers, water tanks, round houses, and stations bear to a railroad. These structures are parts of the railroad, although not parts of the track.

What land is needed for the actual construction of this new type of turnpike and what forms part of it and what is outside of it are matters not to be determined by the same standards as would be applied in the case of the country road of fifty or even of twenty-five years ago. This enterprise must be envisioned as a whole in its larger aspects. In our opinion not only the worked portion of the roadway, including, of course, bridges, abutments, embankments and approaches, but also the kinds of buildings and other structures which we have mentioned and a reasonable amount of land taken or acquired on which to place them are all "needed for the actual construction" of the highway and are parts of it and will be taken or acquired for and devoted to a public use, and land taken for such purposes will not be "more land and property than are needed for the actual construction" of the highway. We think therefore that reasonable takings for these purposes may be authorized by the Legislature under the powers which it possessed before the amendment to art. 10 and which were not cut down by that amendment. Such takings will not be for resale to private individuals. There is involved nothing in the nature of a real estate development which the amendment was designed both to permit within limits and to regulate. The requirements of the amendment are inapplicable.

More doubt may exist as to restaurants, but on the whole, in dealing with such a highway as the proposed turnpike, we are inclined to classify them with the services previously mentioned. Undoubtedly many travellers will seek food on their way across the State. It will be a great convenience to them to find it at a place where they can park their vehicles without interfering with traffic and without the necessity of looking for an exit, searching for a restaurant, and then reëntering the turnpike. The utility of restaurants in connection with travel is attested by the facts that they

have long been a customary feature in railroad stations and are now commonly found at the larger airports. The provision for restaurants may also have some tendency to reduce the amount of stopping along the route and to keep the roadway free of refuse. We think restaurants such as are provided for in the act are parts of the turnpike, and that a reasonable amount of land taken for them is land "needed for the actual construction" of the highway and is devoted to a public use. It seems that the Legislature regarded all these auxiliary structures to which reference has been made as parts of the turnpike, since it included all of them in the definition of "turnpike" in § 4 (b) of the act, and we do not believe that the references to "sites abutting on the turnpike" in § 5 (f) and to "abutting property" in § 5 (k) were intended to narrow the previous definition. It seems obvious that what was said in *Commonwealth* v. *Morrison*, 197 Mass. 199, 205, about a lunch cart obstructing the street in Adams Square in Boston has no bearing upon the nature of a restaurant upon this turnpike as a public use of land. See also *Motoramp Garage Co.* v. *Tacoma*, 136 Wash. 589.

In reaching our conclusions we have derived some assistance from the New York cases of *Blunk* v. *Browne*, 217 App. Div. (N. Y.) 624, *Anderson* v. *Taconic State Park Commission*, 262 App. Div. (N. Y.) 892, affirmed, 287 N. Y. 668, and *People* v. *La Frantz*, 188 Misc. (N. Y.) 989, dismissed for failure to prosecute appeal, 302 N. Y. 699.

The provisions in § 5 (f) of the act for the leasing by the authority of "gasoline stations, restaurants and other services" are not unconstitutional. They do not involve the taking or holding of lands for private purposes. Property leased will still be devoted to the public purpose of the turnpike, to which these services are wholly subordinate. "While land cannot ordinarily be taken by eminent domain for the purpose of renting and sale . . . this principle is

inapplicable where, as here, the property so rented or sold is thereby devoted to a public purpose." *Opinion of the Justices*, 321 Mass. 766, 770. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 377-378. *McLean* v. *Boston*, 327 Mass. 118, 121. See *Murphy* v. *Commonwealth*, 187 Mass. 361, 375; *Wright* v. *Walcott*, 238 Mass. 432, 438; *D. N. Kelley & Son, Inc.* v. *Selectmen of Fairhaven*, 294 Mass. 570, 574-575.

Neither do we think that any difficulty arises from the use of the indefinite expressions "other buildings and facilities which the Authority may deem necessary for the operation of the turnpike" in § 4 (b) of the act and "other services" in § 5 (f). We think it clear that these expressions are to be construed in their respective settings and that they refer only to such buildings, facilities and services as are reasonably necessary for the public purposes of the turnpike as described in the act.

The power granted in § 5 (k) to take "abutting property to preserve and protect the turnpike" is not, we think, a grant of power to take more land than is "needed for the actual construction" of the highway as the words just quoted are used in the amended art. 10 as hereinbefore interpreted. Land really needed to preserve and protect the turnpike is needed for its actual construction within the meaning of art. 10. Doubtless this power to take "abutting property" would be construed with considerable strictness. It is not a roving commission.

We are not entirely clear as to the interpretation to be given to the first question. Sections 1, 5, and 7 of the act, referred to in this question, contain some provisions of such breadth that the widest possible interpretation of the question itself would require us to pass upon practically every separate detailed provision contained in the act, including provisions as to which no direct reference is made and no

doubts are expressed in the order. We do not believe this was intended. We think that this question was designed to ask whether the general plan or scheme of the act whereby power is delegated to the Massachusetts Turnpike Authority to construct the "Massachusetts Turnpike" from a point in the vicinity of Boston to a point at or near the New York line and to exercise rights of eminent domain for that purpose, without further specification in the grant of powers of the location of the turnpike or of the property authorized to be taken, is constitutional without consideration of the particular provisions of § 5 to which reference is made in the second question or of each other particular provision of the act. To this question, so construed, our answer is "Yes." In dealing with this question in this manner we do not mean to imply that we have discovered constitutional difficulties in any part of the act to which no reference is made in the questions or in these answers. We mean simply to preserve the view which the Justices have taken for many years that they cannot properly be called upon to answer a question whether a long and complicated act is constitutional in each and every part without having their attention directed to the particular parts as to which doubts have arisen. *Opinion of the Justices,* 328 Mass. 679, 691, and citations there contained.

To the second question our answer is "No."

In view of what has been said the third question scarcely need be answered; but a brief comment may be proper. When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part. *Ashley*

v. *Three Justices of the Superior Court,* 228 Mass. 63, 81. This may sometimes involve a difficult decision. Where the statute contains a severability clause like that embodied in § 20 of the act here involved, this is a declaration by the Legislature that it intends to have the principle of severability invoked wherever possible. No doubt there are many provisions in St. 1952, c. 354, which are so far collateral and ancillary to the main object of constructing the turnpike that the provisions for accomplishing that main object could stand even if the collateral and ancillary provisions were invalid. Thus it would seem that the fundamental provisions of the act would not be invalidated even if the provision for acquiring sites abutting on the turnpike for the purposes mentioned in § 5 (f) were held invalid; or it might well be held that land could be acquired for such purposes by purchase even if it could not be acquired for such purposes by eminent domain. But inasmuch as in our opinion all provisions of the statute to which our attention has been directed are valid it does not seem profitable to pursue this subject further.

The fourth question asks whether c. 354 of the Acts of 1952 is constitutional without mentioning any particular parts of that statute or informing us as to the nature of any doubts concerning it. This is the sort of question which, as hereinbefore stated, the Justices feel that they are not required to answer. We have answered with considerable fullness all questions of a specific nature where our attention has been directed to the doubts intended to be resolved. We respectfully request that we may be excused from answering the fourth question.

We feel compelled to add that we have entertained serious question as to whether the order of His Excellency the Governor and the Honorable Council shows that they have such present duties to perform in connection with St. 1952, c. 354, as to make this a solemn occasion within the purview

of Part II, c. 3, art. 2, of the Constitution. But in view of the statement in the order that doubts exist as to the power and authority of the executive department of the Commonwealth and the power and duty of officers under its direction to proceed to the discharge of functions assigned to them under that chapter, and in view of the possibility that because of the importance of the statute and the many ramifications connected with such an extensive enterprise as the construction of the turnpike there may well exist or soon arise problems for consideration of His Excellency the Governor and of the Honorable Council of which we are not aware, we have preferred to cast aside our own doubts as to the existence of a solemn occasion and to submit these answers. We do this, however, without intending to depart from the construction heretofore given to Part II, c. 3, art. 2, of the Constitution. See *Opinion of the Justices*, 269 Mass. 611, 618-619.

STANLEY E. QUA.
HENRY T. LUMMUS.
JAMES J. RONAN.
RAYMOND S. WILKINS.
JOHN V. SPALDING.
HAROLD P. WILLIAMS.
EDWARD A. COUNIHAN, JR.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HARRY K. AHOYIAN,
SATENIG AHOYIAN,
HI MANNING,
ELIZABETH BOSWELL,
HAM WUEN CHIN,
GIM SUNG CHIN,
HELEN J. AMES,
DWIGHT S. STRONG, and
ELEANOR B. STRONG

v.

MASSACHUSETTS TURNPIKE AUTHORITY,
PERINI CORPORATION, and
FIRST NATIONAL BANK OF BOSTON, Trustee

Civil Action
No. 62-332-F

ORDER

May 9, 1962

FORD, D.J.

The above-entitled action came before the Court on application of the plaintiffs' counsel for issuance of a temporary restraining order in accordance with the third prayer of the complaint; and after due consideration by this Court, it is hereby

ORDERED that the application for issuance of a temporary restraining order is denied.

By the Court

AUSTIN W. JONES, JR.,
Deputy Clerk

Order entered May 9, 1962

JOHN A. CANAVAN, Clerk
by Grace V. Flood, Deputy Clerk

Enter May 9, 1962

FORD U.S.D.J.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HARRY K. AHOYIAN et als
v.
MASSACHUSETTS TURNPIKE AUTHORITY et als

Civil Action
No. 62-332-F

MEMORANDUM
June 21, 1962

The plaintiffs in the above-entitled action have filed three motions:

(1) Motion to vacate judgment;
(2) Motion for rehearing;
(3) Motion to alter or amend judgment.

All the motions are denied.

FRANCIS J. W. FORD
Judge, United States District Court

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
No. 79,683 Equity

HYMAN RADLER
v.
MASSACHUSETTS TURNPIKE AUTHORITY, et als

July 10, 1962: Application for injunction under prayer 2 denied after hearing, by the court, TAURO, J.

Appendix E.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT
No. 79683 EQ.

HYMAN RADLER
v.
MASSACHUSETTS TURNPIKE AUTHORITY, PERINI CORPORATION, and FIRST NATIONAL BANK OF BOSTON, Trustee.

FINDINGS, RULINGS, AND ORDER

The hearings before me were on defendants' special demurrers, and defendants' plea in bar.

It was agreed by counsel, and I so find, that the plaintiff in this action was one of eighteen plaintiffs in the case of Harry K. Ahoyian, et al v. Massachusetts Turnpike Au-

thority, et al, U. S. District Court for the district of Massachusetts, Civil Action #62,332-F.

It was further agreed by counsel, and I so find, that present issues, in essence, are the same as those in the Federal Court case referred to.

When this case was argued by counsel, I had before me copies of the pleadings, decision and Judgment of the Federal Court dated June 4, 1962. By this decision, the Federal Court, on motion of the defendants, dismissed the plaintiff's action, and Judgment was entered thereon.

(1) *Defendants Special Demurrers.*

All of defendants special demurrers are sustained.*

(2) *Plea in Bar.*

The defendants plead in bar of this action the decision and judgment of the United States District Court in the case referred to. The plaintiff in the present suit was one of eighteen plaintiffs in the Federal case. The Federal case raised the same issues as the instant case. In that case the defendants moved for dismissal on the ground that the complaint failed to state a cause of action. The case was heard and dismissed by a three-Judge Court with an opinion stating the grounds for dismissal.

The Federal Court decision, in my opinion, contained the following rulings:

(1) That the Massachusetts Turnpike Act St. 1952 C. 354 as amended by St. 1955 C. 47 does not violate

*Among the special demurrers sustained were those to allegations that G.L. c. 79, § 40, did not afford the plaintiff a plain and adequate remedy to challenge the sufficiency of security; the ground of demurrer being "that the plaintiff should pursue and exhaust the administrative remedy provided by G.L. c. 79, § 40 before challenging the availability and adequacy thereof in this proceeding."

the 5th and 14th amendments of the United States Constitution and that it does not violate the provisions of the State Constitution.

(2) The plaintiff had an administrative remedy to obtain adequate security for the value of his land under provisions of G.L. C. 79 sec. 40, as modified, and made applicable to land takings by the Turnpike Authority, by St. 1952 C. 354—5-K.

(3) The action of plaintiffs was premature. The U.S. Court said: "Before the plaintiffs can raise any constitutional issues, it is axiomatic that they must exhaust their administrative remedies."

The decision of the Federal Court is a bar to further litigation on all issues which were decided by that court on the merits.

The motion to dismiss in the Federal Court is similar to a demurrer in our state court. Ordinarily the sustaining of a demurrer can not be the basis for res judicata. But it may be. Old Dominion Copper Mining and Smelting Co., v. Bigelow, 203 Mass 159, 205. Capaccio v. Merrill 222 Mass. 308-310.

There can be little doubt that the Federal Court rulings on the constitutional questions are res judicata on future litigation by the same parties on the same issues.

The remaining question is whether the District Court's decision that the plaintiff must first exhaust his administrative remedies before questioning the constitutionality of G.L. C. 70, sec. 40 as modified and made applicable to land takings by the Turnpike Authority, is res judicata and a bar to the present action.

Under the Federal Rules of Civil Procedure, (Rule 41(b)) the decision and order of dismissal by the Three-Judge Court was an adjudication on the merits unless the

Court otherwise specifies, or unless dismissal was for lack of jurisdiction or improper venue.

The learned briefs of both parties, together with their supplementary briefs requested by me were carefully reviewed.

What at first seems a legal problem of simple solution presents questions of magnitude and complexities.

Was the Federal Court decision on the merits of the case? Was its decision jurisdictional? Was it based on substantive or adjective law? Does the rule requiring the exhausting of administrative remedies apply when the constitutionality of the statute containing such provisions is being questioned? Does the law pertaining to full faith and credit apply? Where the Federal Court case was not based on diversity of citizenship, was the U. S. Court bound to follow the procedural rules of the state court?

The case of Angel v. Bullington 330 U. S. 183 presents the closest analogy to the present problem that has come to my attention. The majority opinion, as stated by Justice Frankfurter, seems to be authority for the position taken by the defendants. Dissenting opinions by Justices Reed, Rutledge, and Jackson take the opposite view. I found the reasoning and logic in the dissenting opinions powerful and persuasive.

However, majority opinions of the highest court in the land should serve as guide posts for our trial courts.

The defendants' plea in bar is allowed.

G. Joseph Tauro
Justice, Superior Court.

Entered Sept. 19, 1962